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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 522

F. L. CROWDER TR/AS HARRIMAN BROADCASTING COMPANY, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*,
FOLKWAYS BROADCASTING COMPANY, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner F. L. Crowder tr/as Harriman Broadcasting Company asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this case on June 20, 1968.

OPINIONS BELOW

The opinion of the court of appeals is reported at —— F.2d ——, 13 Pike and Fischer RR2d 2073 and is annexed hereto as Appendix A, *infra* pp. 1-9. The opinion of the Federal Communications Commission is reported at 9 FCC

2d 731, 10 Pike and Fischer RR2d and appears in the Joint Appendix[1] at pages 410-462.

JURISDICTION

The judgment of the court of appeals here sought to be reviewed (App. A, p. 9) was entered on June 20, 1968. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission has recently defined "trafficking" as the acquisition and/or operation of a broadcast station for the primary purpose of selling or otherwise disposing of it for profit rather than for the primary purpose of serving the public interest, and objects to trafficking upon the theory that a government license granted in reliance upon an applicant's stated intention to operate should not, instead, be bartered away for profit to the detriment of the public interest.[2] In this case, the court of appeals has held that the Federal Communications Commission's standard for testing allegations of trafficking in broadcast authorizations has always been clear and that the Federal Communications Commission acted properly in denying the application of Petitioner, a former licensee, because he had previously engaged in trafficking in licenses and had made misrepresentations to obscure a pattern of trafficking. In doing so, it has enlarged and distorted trafficking so as to imply that every broadcaster who desires to sell his broadcast facilities has an intent to traffick

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[1] The record in the court of appeals and the original record have been certified to this court. Citations are to the original record and are cited as "R." The Joint Appendix in the court below has been provided to this court and will hereafter be cited as "JA."

[2] *Folkways Broadcasting Company, Inc.* v. *Federal Communications Commission*, 375 F. 2d 298 (D.C. Cir. 1967).

in broadcast authorizations. The questions presented on this petition are as follows:

(1) Whether the standard of the Federal Communications Commission for testing allegations of trafficking in broadcast authorizations is and always has been clear and provides a predictable basis for broadcasters to rely upon in conducting the normal and continuous changes in ownership within the broadcasting industry?

(2) Whether the result of the decision below leaves the trafficking policy of Respondent so vague and vascillating in testing allegations of trafficking as to place every broadcaster when he desires to sell his broadcast facilities in jeopardy of being accused of trafficking by any competing broadcaster and being subject to defending himself in a costly administrative hearing regardless of how long or how well he has served the public?

(3) Whether the court below, in upholding and applying the trafficking policy of the Federal Communications Commission, erred in finding an intention to engage in trafficking on the part of Petitioner and consummation of such an intention in (1) the acquisition and sale of a radio station owned wholly or in part for ten years (WHBT, Harriman, Tennessee), and (2) the acquisition and sale of a radio station owned by Petitioner for two years (WDEH, Sweetwater, Tennessee) where Petitioner represented to Respondent that he wished to sell both in order to retire from the broadcasting business in the respective communities in which said stations were located without further indicating in the applications so to sell that such reasons were motivated by the ill health of Petitioner; where Petitioner had on file with Respondent, at the time the applications to sell WHBT and WDEH were pending, an application for a third radio station in a different community (WLIV, Livingston, Tennessee) in which he was proposed as the "General Manager" and a fifty percent owner; and where Petitioner

was not active in the operation of the third station (WLIV) after it went on the air for the eight-year period during which Petitioner held his ownership interest therein?

(4) Whether the court below erred in upholding Respondent's reversal of the Hearing Examiner's findings as to credibility of the testimony of Petitioner and the key witness against Petitioner when the Hearing Examiner had the advantage of viewing the demeanor of both Petitioner and the witness and whose findings as to credibility should be given special weight, especially when credibility is so important to the present case?

STATUTES AND REGULATIONS INVOLVED

1. *Communications Act of 1934*, as amended. Sections 1, 309(d) and 311(c) (47 U.S.C. §§ 151, 309(d), and 311(c)) provide as follows:

> Sec. 151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act."

Section 309(d)(1). "Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The Petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the Petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission

for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e)."

Sec. 311(c)(1). "If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

(4) For the purposes of this subsection an application shall be deemed to be 'pending' before the Commission from the time such application is filed with the

Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court."

2. *Federal Communications Commission Rules and Regulations:*

47 CFR Section 1.597 provides as follows:

Sec. 1.597. "Procedures on transfer and assignment applications.—

(a) If, upon the examination, pursuant to Sections 309(a) and 310(b) of the Communications Act of 1934, as amended, of an application for Commission consent to an assignment of a broadcast construction permit or license or for a transfer of control of a corporate permittee or licensee, it appears that the station involved has been operated by the proposed assignor or transferor for less than three successive years, the application will be designated for hearing on appropriate issues pursuant to Section 309(b) of the Communications Act of 1934, as amended, unless the Commission is able to find that:

(1) The application involves a translator station only, an FM station operated for at least three years together with a Subsidiary Communications Authorization held for a lesser period; or

(2) The application involves a *pro forma* assignment of transfer of control; or

(3) The assignor or transferor has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes that due to unavailability of capital, to death or disability of station principals or to other changed circumstances affecting the licensee or permittee occurring subsequent to the acquisition of the license or permit, Commission consent to the proposed assignment or transfer of control will serve the public interest, convenience and necessity.

(b) The commencement date of the three-year period set forth in paragraph (a) of this section shall be determined as follows:

(1) Where the authorizations involved in the application consist of a license and a construction permit authorizing a major change in the facilities of the licensed station (as defined in §§ 1.571, 1.572, and 1.573), the three-year period shall commence with the date of the Commission's grant of the construction permit for the modification. However, when operating authority has been issued to cover the construction permit for a major change in facility, the commencement date for calculating the length of time the station has been operated for purposes of this section shall then revert to the date the licensee received its original operating authority. A grant of authority for minor modifications in authorized facilities shall have no effect upon the calculation of this time period.

(2) Where the authorization involved in the application consists of a permit authorizing the construction of a new facility, or a license covering such permit, the three-year period shall commence with the date of issuance of initial operating authority.

(3) Where the operating station involved in the application was obtained by means of an assignment or transfer of control (other than *pro forma*), the three-year period shall commence with the date of grant by the Commission of the application for said assignment or transfer of control. If the station was put in operation after such assignment or transfer, paragraph (b)(1) and (2) of this section shall apply.

(4) Where an application is filed for Commission consent to a transfer of control of a corporation holding multiple licenses and/or construction permits, the commencement date applicable to the last-acquired station shall apply to all the stations involved in the transfer, except where the application involves a FM station operated for less

than three years and an AM station operated for more than three years, both serving substantially the same area. Said exception shall apply to the same circumstances where assignment applications are involved.

(c) In determining whether a broadcast interest has been held for three years, the Commission will calculate the period between the date of acquisition as specified above and the date the application for transfer or assignment is tendered for filing with the Commission.

(d) With respect to applications filed after the three-year period, the Chief of the Broadcast Bureau is directed (1) to examine carefully such applications, on a case-to-case basis, to determine whether any characteristics of trafficking remain; and (2) if so, to seek additional information by letter inquiries to the applicants, such as that which will be required to be developed and tested in the hearing process with respect to stations held less than three years.

STATEMENT

This petition seeks review of the decision of the court of appeals holding that the Federal Communications Commission's standard for testing allegations of trafficking in broadcast licenses has always been clear and that the Federal Communications Commission, after hearing on the trafficking issue raised by the only existing broadcast facility in the community applied for, did not err in denying on the trafficking issue only the application of Petitioner for a construction permit for a new standard broadcast station for the community. In reaching its decision, to deny the application of Petitioner, the Federal Communications Commission reversed the findings of the Hearing Examiner both as to the credibility of the key witness against Petitioner and Petitioner himself and thereby concluded the Petitioner intended to traffick in broadcast authorizations. In upholding the action taken by the Commission, the court of appeals has added to the vague-

ness and unpredictability of the FCC policy with regards to trafficking in broadcast licenses with a new concept which will have adverse and far-reaching effects on the future of all broadcasters and the broadcasting industry.

A. The Facts

This case arises from the June 20, 1968,[3] decision of United States Court of Appeals of the District of Columbia which held that the Federal Communications Commission's standard for testing allegations of trafficking in broadcast authorizations has always been clear and that FCC Rule 1.597 merely reflects a previously established standard. The appeal arose from the August 8, 1967,[4] decision of the Federal Communications Commission which *inter alia* denied the application of Petitioner for a construction permit for a new standard broadcast station to be operated on 970 kHz with 500 watts power, daytime only, in Harriman, Tennessee. The application was filed with the Commission on October 4, 1961. Except for an amendment filed on November 13, 1961, nothing occurred with respect to the application for more than 14 months. On December 10, 1962, the licensee of Radio Station WHBT in Harriman (Folkways Broadcasting Company, Inc., hereinafter "Folkways") requested the Commission to either deny Petitioner's application or to designate it for hearing on seven issues.[5]

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[3] — F. 2d —, 13 Pike and Fischer RR 2d 2073.

[4] Released on August 9, 1967, 9 FCC 2d 731, 10 RR 2d 981 (R.1117).

[5] The issues were: (1) To determine whether there are adequate revenues to support more than one standard broadcast station in Harriman, Tennessee, without loss or degradation of standard broadcast service to Harriman and surrounding areas; (2) To determine whether the applicant is financially qualified to construct and operate the proposed station and whether its estimate of expected operating revenues and expenses is reasonable; (3) To determine whether F. L. Crowder in view of his proposals as

The factual circumstances of this case are quite complex. Prior to 1946, Petitioner had not engaged in any broadcasting activities. In that year, a group of Harriman businessmen formed a corporation known as Harriman Broadcasting Company, Inc., to request permission of the Commission to construct a standard broadcast station on 1230 kHz with 250 watts power in Harriman. Permission was granted and the station went on the air in 1947 as WHBT. Petitioner took over in 1948 as its operating head. Petitioner, a Harriman resident, owned eight of 48 shares in the corporation. His stock was valued at $4,000.

Petitioner operated WHBT from 1948 through the remainder of its group ownership. On April 24, 1950, the corporate group requested approval of the Commission to transfer all of the company's stock to Petitioner in return for a payment to the others from Petitioner of $20,000. The total value of the corporation stock, including Petitioner's eight shares, was $24,000.

After Commission consent, the transfer was consummated on August 16, 1950. At this point Petitioner for

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to staff and operating expenses is qualified to operate its (sic) station in the manner proposed by his application; (4) To determine whether the applicant, F. L. Crowder, has made any efforts and if so to what extent to determine the tastes, needs and desires of Harriman, Tennessee, in the service area his proposed station will provide with technical service; (5) To determine whether the applicant has concealed or failed to disclose or attempted to misrepresent any material representation in connection with the statements in his application concerning his efforts to survey the community he proposes to serve and the community's needs; (6) To determine whether F. L. Crowder has been engaged in the trafficking of broadcast authorizations and whether the captioned proposal for a station in Harriman, Tennessee, would create an opportunity for trafficking contrary to the purpose for which a broadcast authorization is granted; and (7) To determine in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the captioned application would serve the public interest, convenience and necessity. (R. 104).

the first time became the sole owner of any broadcast station. He continued in his WHBT capacity as its operating head for six more years. In 1951, he filed the required application for the WHBT license renewal. He acquired an FM construction permit for Harriman in 1953 and started to build it. In 1954, he made improvements to WHBT at a cost of $2,047. That same year, Harriman Broadcasting Company, Inc., received permission from the Commission to construct a standard broadcast station in Sweetwater, Tennessee,[6] on 800 kHz with 500 watts power, daytime only. Commission consent to the construction was received on September 15, 1954, and construction was commenced. At this point in time, Harriman Broadcasting Company, Inc., owned wholly by Petitioner had WHBT in Harriman (since 1946), a construction permit for an FM station in Harriman (since 1953) and a construction permit for WDEH in Sweetwater.

Several things occurred with respect to the three facilities in 1954. A fire destroyed the FM transmitter and the building in which it was housed. Petitioner was advised for tax reasons by his accountant to hold the assets of Harriman Broadcasting Company, Inc., as an individual rather than the owner of 100% of the corporate stock. Hence, on December 7, 1954, the FM permit was returned voluntarily to the Commission by Harriman Broadcasting Company, Inc. On that same date the Commission was requested to approve the assignment of the license of WHBT and the construction permit for WDEH from Harriman Broadcasting Company, Inc., to Petitioner personally. It did so, and the assignments were made on December 31, 1954. Harriman Broadcasting Company, Inc., was then dissolved. (JA 516, 580) By January, 1955, construction of WDEH in Sweetwater, was completed and on the first day of February a license application for WDEH was filed with the Commission. Program tests

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[6] Sweetwater is some 30 road miles from Harriman.

were authorized on February 4, 1955, and the Commission granted the WDEH license application on February 17, 1955. Petitioner, at this point, owned as an individual licensee stations WHBT in Harriman, the town of his residence since 1932, and WDEH in Sweetwater, an absentee-licensee facility. (JA 597)

On June 22, 1955, Petitioner as a result of ill health engaged Blackburn-Hamilton (now Blackburn and Company, Inc.) media brokers to sell both stations. As a result, on January 18, 1956, Petitioner executed a contract for the sale of WDEH for $52,500 to Marto Broadcasting Company. On February 14, 1956, an application to assign the license of WDEH to Marto was filed with the Commission. For reasons connected only with Marto, the application was withdrawn on July 25, 1956.

In 1956, Petitioner had also filed an application to increase WDEH's power from 500 watts to 1,000 watts. The assignment of license application was granted on August 29, 1956, and consummated on September 5, 1956.

On April 13, 1956, Petitioner contracted to sell WHBT to Folkways Broadcasting Company, Inc., which at that time was composed of Ernest Tubb, Hank Snow and William McDaniel. (The present principals of Folkways had no connection with the purchasing corporation in 1956.) The sale price was $80,000 with $10,000 down and the balance in 83 installments of $835 per month, with the final payment of $695. The balance due of $70,000 was evidenced by a note in that amount secured by a deed of trust on the real estate and chattel mortgage on the personalty. The Commission granted the application on June 13, 1956, and assignment was effective July 1, 1956. In 1955, Petitioner's brother-in-law, Reuben H. McCoin[7] operated an automobile dealership in Livingston, Tennessee, which is some 75 road miles from Harriman. In that year, McCoin

[7] McCoin died in 1966.

sold his dealership desiring to engage in broadcasting, but, knowing nothing of the business, McCoin approached Petitioner to help him and a partnership between the two was formed. (JA 605-607, 640)

In January, 1956, before any application was filed to sell WHBT or WDEH, the partnership filed with the Commission an application signed by Petitioner for permission to construct a standard broadcast station in Livingston on 920 kHz with 1,000 watts power, daytime only. The applicant was composed of Petitioner and McCoin as equal partners doing business as Audio Broadcasters. Anticipated cost of construction was $11,875, with each partner to contribute $7,500 as new capital. Petitioner was listed in the application as the proposed General Manager with McCoin as the proposed Station Manager. The Commission granted the Livingston application on May 3, 1956. The station was constructed by November of that year when an application signed by McCoin for license for WLIV to cover the construction permit was filed.[8] WLIV went on the air on November 16, 1956, when the Commission granted program test authority. The license was granted by the Commission on November 26, 1956.

In September, 1956, during the period WLIV was under construction, Petitioner purchased the 7-Up Bottling plant in Livingston.[9] From 1956, onward, for several years, Petitioner spent several days each week at the Livingston bottling plant.

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[8] From this time onward, every application for WLIV was signed by McCoin. Neither the Commission's files nor those of Blackburn-Hamilton contain any record of Petitioner again executing any document or application involving Station WLIV. Prior to the filing of his WLIV application, Petitioner had signed all applications regarding WHBT and WDEH.

[9] Petitioner still owns this business and now values the building and equipment used therein at $239,599.

The WLIV license renewal application signed by McCoin was filed with the Commission on May 4, 1958. Therein Petitioner was still listed as General Manager with McCoin as Station Manager, although Petitioner did not see this application or know that he was listed in any staff capacity. (JA 606-607) The Commission renewed the WLIV license on July 2, 1958.

Going now to the acquisition of Folkways by its present majority stockholder, Kenneth J. Crosthwait. Crosthwait was employed at WHBT as assistant manager by Tubb and Snow after Petitioner had sold WHBT to Folkways in 1956. (JA 798-799) On May 28, 1960, Crosthwait bought a 50% ownership in Folkways for $5,000. He acquired the remaining 50% for $8,000 on July 20, 1961. Crosthwait continues today as the majority owner of Folkways,[10] though he lives in West Virginia and operates a station there.

Thusly, by December 10, 1962, when Folkways petitioned to deny or to set for hearing Petitioner's application for permission to construct a new standard broadcast station at Harriman, the original Folkways stockholders had sold their interests to Crosthwait who in turn had sold minority stock interests to Carrigan and Roberts. Both the call letters of the Harriman station (WHBT) and the name of the corporate licensee (Folkways) remain the same as they had been.

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[10] In 1962 Crosthwait sold a 10% interest in Folkways for $10,000 to William R. Carrigan and a 10% interest for $10,000 to Grant Roberts. This was $7,000 more than he paid for his 100% stock interest. On January 15, 1965, Crosthwait sold an additional 5% interest for $5,000 to Carrigan and 5% to Roberts for $5,000. This reduced Crosthwait's interest in common voting stock to 70%, Carrigan and Roberts each having 15%. In April, 1966, 150 shares of preferred non-voting Folkways stock was sold to Messrs. Brown, Neil and Rymer for a total consideration of $15,000. (JA 802-804).

This then was Petitioner's broadcast activity in pertinent part from its inception in the mid-40's to December, 1962, when Folkways as the licensee of Station WHBT in Harriman, filed its petition to deny. In sum, in 1952, Petitioner had owned a part or all of WHBT in Harriman for ten years (1946-1956), and had been operating WHBT for 8 years (1948-1956). He signed all applications regarding this station. He had owned WDEH in Sweetwater for two years (1954-1956) and had operated it at all times with hired managers. He signed all applications regarding this station. He still owned a 50% interest in WLIV in Livingston, which he had for six years (1956-1962) but had not been active in the station since it went on the air. He signed only the application for permission to construct the station, McCoin having signed the license application in 1956 and the renewal application in 1958 and 1961. From the sales of WHBT and WDEH, Petitioner realized a total gain of $83,050 (sales prices less depreciation asset value). (JA 606, 648-649, 668-669).

On December 10, 1962, Folkways filed its Petition to Deny, requesting denial of Petitioner's application to construct a second radio station in Harriman or alternatively, that Petitioner's application be set for hearing. Of the seven issues requested, one was directed to a trafficking allegation and one to a Carroll economic issue.[11] Various pleadings followed. On January 8, 1963, Petitioner responded to the Folkways petition to deny. In pertinent part therein as to the allegations of trafficking, he stated that:

> "The true facts (sic), which are conspicuous by their absence in the Folkways petition, are that Crowder was forced to sell his radio interests due to ill health. Upon a doctor's advice, Mr. Crowder retired completely from active participation in the radio industry." (R. 144)

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[11] *Carroll Broadcasting Company, Inc.* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958).

For the sake of some semblance of chronology, it is necessary to turn to Petitioner's 50% ownership in WLIV. On April 14, 1954, an application to assign Petitioner's 50% interest in the station's license to McCoin for $50,000 was filed with the Commission.[12] On May 11, 1964, the Commission granted the assignment application. Thusly, the petitioner had his Livingston interest for eight years (1946-1954).

On December 17, 1965, the Commission wrote to Petitioner stating:

> "In your opposition (to the Folkways petition to deny) you state *inter alia* that you sold your two radio interests in 1956 because of ill health; however, our records indicate that about that same time you were a party to an application for a construction permit for a standard broadcast station in Livingston, Tennessee, in which you were listed as a 50% partner and proposed General Manager. In view of the apparent inconsistency between the statement referred to above and the representations contained in the two applications for assignment of license and in the application for Livingston, you are requested to supplement your opposition pleading with a further statement covering this matter. Such supplemental statement should be served upon the petitioners and their counsel if any." (R. 309)

In a supplemental statement filed with the Commission on December 27, 1965, Petitioner through counsel responded as follows:

> "In 1956, Mr. F. L. Crowder owned two broadcast properties, one in Sweetwater and the other in Harriman, Tennessee. His health became such that he could no longer continue in the day-to-day active operation thereof, and for that reason both stations were sold in that year. It was his intention then to withdraw from such activity and the Commission was so in-

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[12] On June 9, 1965, McCoin filed an application to assign the license of WLIV to WLIV, Inc., for $130,000.

formed. The same year his brother-in-law, Mr. R. H. McCoin, was unemployed and wished to become engaged in broadcasting, having sold his car agency in 1955. Because he was totally inexperienced in such matters, Mr. McCoin looked to Mr. Crowder for guidance and wanted him to have a 50% interest. Mr. Crowder agreed to do so upon two premises; i.e., (1) that he would act in a supervisory capacity in the preparatory stages of the application and until the station went on the air, and (2) after that point in time, he would act only as an advisor upon an as-needed basis. While the term "General Manager" perhaps is not wholly descriptive of his activity in recommending and hiring attorneys and consulting engineers, obtaining equipment and the like, it was not used with intent to deceive or confuse. In point of fact, it did describe his overall responsibility before the station began broadcasting. Subsequent thereto, he was not active in any role except that of an advisor, a situation which existed from about November, 1956 to June, 1964, when he disposed of his stock interest.

In sum, because of the then state of his health, Mr. Crowder's last operational activity upon a routine basis in the broadcast field occurred in 1956, before he disposed of his interests in the Sweetwater and Harriman stations . . . his only activity in connection with (WLIV in Livingston) other than purely as a stockholder was in an advisory capacity upon an occasional basis when his brother-in-law as 'Station Manager' relied for advice upon what expertise Mr. Crowder had accumulated in this field." (R. 311-312)

By Memorandum Opinion and Order adopted on January 12, and released on January 14, 1966, the Commission granted Petitioner permission to construct his station in Harriman (later to be known as WXXL). At this point, Petitioner became a Commission permittee under the terms of a construction permit which required him to complete construction of the proposed station in Harriman within an eight-month period from the date of grant. Folkways did not request a stay of the Commission, and Petitioner commenced station construction.

Folkways filed a Notice of Appeal on February 11, 1966, with the United States Court of Appeals for the District of Columbia alleging fundamentally that the Commission erred in not holding a hearing in the matter, although Folkways still did not request a stay to prevent construction by Petitioner.

On August 2, 1966, Petitioner notified the Commission that he had completed construction of his Harriman station, requested issuance of program test authority, and applied for license. Program test authority was granted on August 11. 1966, and WXXL commenced broadcasting on August 12, 1966.

On January 5, 1967, the United States Court of Appeals for the District of Columbia, Judge Tamm dissenting, reversed the Commission's January, 1966, decision on the ground that a hearing was required under Section 309(d) of the Communications Act, as amended, 47 U.S.C. Section 309(d), to determine whether Petitioner had engaged in trafficking of broadcast authorizations and whether the advent of a new station in Harriman would lead to degradation of service to the public.[13] The Court rejected the other issues sought by Folkways and remanded the case for further proceedings.[14]

B. The Decisions Below

On March 3, 1967, the Commission ordered a hearing and designated the following issues:

> "1. To determine whether the applicant (Crowder) has engaged in trafficking in broadcast authorizations.
>
> 2. To determine whether there are adequate revenues to support more than one standard broadcast station

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[13] *Folkways Broadcasting Company, Inc.* v. *Federal Communications Commission,* — U.S. App. D.C. —, 375 F. 2d 298 (D.C. Cir. 1967).

[14] WXXL haa been off the air since August 31, 1967.

in the area to be served without a net loss or degradation to standard broadcast service in the area.

3. To determine in the light of the evidence adduced pursuant to the foregoing issues whether a grant of the application would serve the public interest, convenience and necessity.". (R. 284)

Under the designating Memorandum Opinion and Order, the Hearing Examiner was to have written an Initial Decision on the whole case which was subject to ordinary although accelerated review. However, by Order released on May 16, 1967 (R. 553), the Commission ordered that the record be certified to it for decision. This was done on May 22. On June 21, 1967, the Commission adopted an order which remanded the record to the Hearing Examiner ". . . so that he may prepare an initial decision solely with respect to Issue 1 (trafficking) . . ." (R. 1075)

The Hearing Examiner issued his 29-page Initial Decision on June 30, released July 3, 1967. (R. 1083) Therein he considered, *inter alia*, the evidence of record as it pertained to the acquisition of WHBT; the construction and acquisition of WDEH; the sale of WHBT and WDEH; the acquisition of Crowder's interest in WLIV; the sale of petitioner's interest in WLIV;[15] Petitioner's gain from WHBT, WDEH, and WLIV sales; motive and intent; and the community survey.[16]

With regard to the sale by Petitioner of WDEH, which Petitioner regarded as being forced upon him by the performance of two successive managers of that facility, the Examiner noted that:

"Despite Folkways' ridicule, there was more than Crowder's spontaneous fancy in his assertion that he

[15] Except to mention Petitioner's monetary gain, the Commission does not rely to any degree in its decision upon the sale of Petitioner's interest in WLIV to support its trafficking conclusion (R. 1126).

[16] The Commission made no mention in its decision of this evidence.

had been plagued by misbehaving sales managers at WDEH, since the assignee of that license in 1956 long before the present proceeding made a similar statement." (R. 1109)

Harry T. Burn, the banker who financed Folkways, testified that in 1957 Petitioner told him that he acquired stations for the purpose of selling them. As to the testimony of Burn, relied upon heavily by Folkways in its attempt to establish an intention to engage in trafficking, the Examiner evaluated thusly the alleged conversations with Petitioner to which Burn testified:

"Crowder in effect accuses Burn of spinning these dialogues out of his imagination; he denies that this took place. It need hardly be stressed that Burn was not a disinterested witness. His bank had filed a petition to deny Crowder's application; and his professions of friendship for Crowder are suspect in light of his testimony. But there is no doubt of his close association with Crosthwait, Folkways' chief stockholder. He has a natural reason to be vexed at Crowder for having possibly but certainly unexpectedly impaired the security of the bank's loan to Folkways.

"The Hearing Examiner has already disavowed possession of a touchstone which distinguishes genuine gold from gilt. As to probability, inferred from the plausibility of the setting and the relative power of the participants' recollections, the chances are that on closer inspection, details are too well remembered for credibility by one of the supposed speakers (Burn), and that his recollection is so selectively retentive as to impugn the value of the specific testimony. Thus, if Burn is to be exposed to the same niggling inspection to which Crowder has been subjected, it may be observed that he had an imperfect memory of his own immediate affairs (interest in WOVE), but gave what purported to be veristic accounts of the Crowder talks down to details of station authorization. As Crowder points out, however, Burn was wrong about his recountal of the McMinnville area as virgin territory

into which Crowder thought it profitable to build a station . . . Again, there is something unreal, in view of Burn's less than unfailing memory, in his testimony that some four years after his conversation with Crowder when Crowder admitted to his addiction to trafficking, and after Crowder had applied for WXXL, he accosted Crowder and accused him of apostasy from his own creed, just as if they had left off talking a minute before and had now resumed their chat." (R. 1109-1111)

Regarding Petitioner's broadcast ownership history against which any charge of trafficking must be weighted, the Examiner found that:

"Of overriding significance, applicable to the case as a whole, is the fact that the number of stations to which, without more, there could be a suspicion of trafficking, is one. Crowder had a minority interest in WHBT from 1947 to 1950, and 100% ownership from then until its sale in 1956. He was a 50% owner of WLIV from 1956 to 1964, when he was persuaded to sell it by his partner-brother-in-law, who may have (and this is purely extra-record conjecture, and in any event immaterial to the case) resented Crowder's drawing $5,000 to $6,000 a year on a $7,500 money investment while he was doing little or no work; it was in the findings of fact, however, that within a year of his buying Crowder out, McCoin sold WLIV for a sizable gain, inducing a supposition that he had not been heartbroken at Crowder's departure.[17] (The periods for which Crowder held WHBT and WLIV are much longer than the minimum three-year holding which is a condition precedent to assignment without hearing, in the recent past established by the Commission, Rule 1.597). The one remaining station con-

[17] Less than 13 months later, McCoin sold WLIV for $130,000. On capital gain alone, McCoin made $72,500 from the sale ($130,000 less $50,000 paid to Crowder, less $7,500 capital contribution). Such gain does not consider any returns to McCoin during the period from 1956 to 1965, when he owned 50% or all of WLIV, and was its operating head.

> structed and sold within a fairly short time was WDEH. No matter how strenuously his opponents attempt to magnify Crowder's derelictions, therefore, it is clear that they are attaching a mighty big barnacle to a mighty small hull. The basic material for a charge of trafficking (in criminal law terms the *corpus delicti*) is not present." (R. 1109)

The Examiner concluded that ". . . the applicant, F. L. Crowder, has not engaged in trafficking in broadcast authorizations . . ." (R. 1112)

On August 8, 1967, the Federal Communications Commission adopted its decision reversing the Hearing Examiner, although the Commission was ". . . in substantial agreement with the findings of fact . . ." narrated in the Examiner's Initial Decision. It based its opinion on its belief ". . . that the conclusions (in the Initial Decision) fail to accord proper weight to relevant and material evidence of record bearing on the question of trafficking, and that undue emphasis has been placed on certain facts, while others of equal or greater significance have not been given proper consideration."[18] (R. 1120)

The Commission denied Petitioner's application for a construction permit for a new standard broadcast station (AM) in Harriman, and ordered WXXL (which Petitioner had been operating with Commission approval since August, 1966) off the air as of August 15, 1967.[19]

On August 11, 1967, the decision of the Federal Communications Commission was appealed to the United States

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[18] It did not "in light of (its) conclusions concerning WHBT and WDEH resolve the trafficking issue as it relates to the Livingston station (WLIV)." Since it found that its findings and conclusions regarding the trafficking issue disposed of the case, it made no findings and conclusions regarding the Carroll issue. (R. 1126)

[19] The Circuit Court of Appeals stay permitted Petitioner to broadcast through August 31, 1967.

Court of Appeals for the District of Columbia Circuit. On June 20, 1968, the Circuit Court of Appeals affirmed the decision of the Federal Communications Commission. It disagreed with Petitioner's contention that the Commission never seemed to be able to arrive at a policy which provides a predictable basis or standard to test allegations of trafficking. Rather, the Court of Appeals held that the Commission's standard for testing allegations of trafficking in broadcast authorizations had always been clear and that Rule 1.597 merely reflects a previously established standard.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creates a Precedent and Upholds a Regulatory Policy With Regards to Trafficking in Broadcast Authorizations Which Is So Vague and So Vacillating as To Threaten the Future of the Entire Radio and Television Broadcasting Industry, and Which Is Unjustly Applied to Petitioner.

The Court of Appeals in this case has held that the Federal Communications Commission's standard for testing allegations of trafficking in broadcast authorizations has always been clear and that Rule 1.597 merely reflects a previously established standard. This holding is irreconcilable with the entire case law in the area of trafficking. By creating "new law" in this area, the decision of the Court of Appeals places every broadcaster in both radio and television broadcasting in danger of being accused and convicted of trafficking, if and when he desires to sell his facility, regardless of how long he has owned his particular broadcast station. It opens every application for assignment of license or transfer of control to attack on trafficking grounds by competing broadcasters. This places the future growth and stability of the entire broadcasting industry in serious jeopardy. Adverse repercussions of this decision have already been felt in the industry. (*Infra*, pp. 48-51) The present case points out the vast extent to which the vague trafficking policy of

the FCC can reach out to grasp the innocent broadcaster, years after the act complained of, and after many years of dedicated service to the public interest and welfare.

This is a case where a broadcaster with an 18-year ownership record in only three broadcast stations has been subjected to what the Hearing Examiner has termed a "niggling" inspection, and branded a trafficker on the basis of unfair and unwarranted context and record distortion. He has been judged, in effect, in 1967 by 1962 Federal Communications Commission policy, for two station sales which occurred in 1956. His testimony as to what occurred and why has been found unworthy of belief by the agency which prefers the testimony of an admittedly interested witness (Burn), who repeatedly was contradicted by the Commission's own files and the testimony of another witness called by Folkways (Crosthwait).

In its effort to support a conclusion of an intention in Petitioner to engage in trafficking, the agency has ignored the patent bias against Petitioner displayed by Burn, has ignored the fact that at the two conversations (in 1957 and 1961) he said he had with Petitioner, no one else was present, and has ignored the inherent unlikelihood that either conversation took place. Despite Burn's avowal that Petitioner is a friend and a customer of Burn's bank, the fact is that Petitioner and Burn are at best mere acquaintances. For instance, the record is indisputably clear that Petitioner has never been a customer of Burn's bank, that Burn and Petitioner are not residents of the same community, that they are not members of the same political parties, that they are not members of the same church, that they have never socialized together, and that neither is a member of a club to which the other belongs. Equally important, it is incongruous to believe that Petitioner, even supposing he had such an intention to traffick, would confide such intention to Burn, a man Petitioner knew to be closely associated with Folkways and biased

against Petitioner and could use such information against Petitioner. Obviously, it is highly improbable that Petitioner, or any reasonable man in Petitioner's position, would confide such an intention in Burn, a known adversary.

The Commission ignores the fact, also, that Burn places the first alleged conversation with Petitioner in Burn's bank in Rockwood in the Spring of 1957. Utterly no reason has been advanced to explain why Petitioner would even be there. Both WHBT and WDEH had been sold since mid-1956. Petitioner had no reason to discuss the radio business with Burn. Yet, the agency finds that Burn's uncorroborated, interested, and biased testimony is credible. In doing so, it disregards the view of the Hearing Examiner who terms Burn's account of events, in light of Petitioner's actual experience, a "pathetic exaggeration" in finding Burn's recollection to be so selectively retentive as to impugn the value of his specific testimony. Although the Court of Appeals ordered a hearing, the agency has chosen to override the decision of the trier of facts who was present throughout the hearing and witnessed the demeanor of the witnesses and to draw its conclusions on the cold record.

From 1946 when Petitioner first acquired any broadcast interest to 1956, Petitioner filed a minimum of 27 applications and reports with the Commission. In one he made a mistake. It was not about programming. It was not about broadcasting at all. He listed ownership under "other business interests" of a billiard parlor when he then owned ⅔ of that business plus all the building in which it was located. The business and building were acquired in 1944. Petitioner has always (even through today) operated the business with a manager. In 1949, he sold a one-third interest in the business to the manager. He sold this interest to the manager not for monetary profit but rather to give the manager a vested interest in the operation of the station. Petitioner reasoned this

would induce responsible operation of the station. In 1950, he forgot to note that sale in this totally unrelated business which has no financial or other relationship to Petitioner's broadcasting record. The mistake was mechanically repeated by those who filled out some of Petitioner's Commission applications, and not caught by Petitioner in his inspection thereof. Somehow, the Commission finds in this isolated bit of relative trivia an importance in placing an intent to traffick in Petitioner. No matter how much surmise, conjecture and over-inflation are present in the Commission's theory, the listing error simply does not warrant the inferred "deliberate misrepresentation" elevation given to it by the Commission. And, *arguendo*, even if it did, what possible relationship to trafficking has the mistake?

In 1956, Petitioner told the Commission that his purpose in selling WHBT after ten years' ownership and WDEH after two was to withdraw then from broadcasting in Harriman and Sweetwater, respectively. At the time of those statements, he and his brother-in-law had on file with the Commission an application to construct WLIV in Livingston. Petitioner had put up one-half the funds for that purpose and owned one-half of the company, but he had told his brother-in-law that he would not be active in the operation of WLIV after he helped him put it on the air. In that application, Petitioner was listed as the proposed General Manager and his brother-in-law was the proposed Station Manager. Petitioner lived in Harriman. McCoin lived in Livingston, some 75 miles away. The Commission granted the WLIV construction application and granted the applications to assign the WHBT and WDEH licenses, all in 1956.

Petitioner did exactly as he represented to the Commission that he would do. He did withdraw from the radio business in both Harriman (WHBT) and in Sweetwater (WDEH). He did act as General Manager for WLIV

until it was placed on the air in 1956. From that time on, this record and the Commission's own files reveal that he did absolutely nothing in the day-to-day operation of WLIV in Livingston. His brother-in-law was the active head and remained so until he sold WLIV at a profit in 1965 after buying out his inactive partner in 1964.

Let it be said again that the Commission finds no fault with the service any of these three stations gave to the public during the entire period Petitioner had any interest in them. However, to support its opinion of trafficking, the agency points to Petitioner's being represented in 1956 as "General Manager" of WLIV and states that this was a "deliberate misrepresentation"—it does that despite the fact that it found in 1966 on the exact same circumstances to the contrary. It goes further. Although Petitioner filed no applications for WLIV after it was granted a construction permit in 1956, did not even see them, and in fact was completely inactive in the business, the agency lays McCoin's continued listing in other WLIV applications as General Manager at Petitioner's doorstep. Therein, also, it finds an intent to engage in trafficking. How McCoin's error in those actions (or Petitioner's in identifying his pre-operational general manager type duties as those of a General Manager but not then stating in 1956 to the agency that he would not perform as a General Manager after WLIV went on the air) has anything to do with trafficking is left to the imagination. In point of fact, it would seem that a trafficker would *not* reveal to the Commission intended continuation of broadcast activity, that he would hide it instead. Petitioner, on the other hand, did the opposite. Even viewed as a "deliberate misrepresentation," as it was not, the agency theory notwithstanding, it bears no relationship to an intent to traffick. Petitioner is not on trial for proneness to err even assuming that the two incidents (billiard parlor and General Manager) amount to that. That is not the issue.

One other factor is used by the Commission and the Court of Appeals to support their decisions. They misread the plain language, and ignore the intent, of Petitioner's 1965 response to an agency inquiry. He said therein that he sold WHBT and WDEH in 1956 because of illness caused by employee mismanagement of WDEH. During the hearing, he explained that such illness commenced in 1955 after WDEH became operational in February. For that reason, he placed the two stations on the market in June of that year. The Commission seizes upon the 1965 response, which interpreted as the agency and Court of Appeals choose to do, as a misrepresentation as to illness commencement. The Petitioner's response is before the Court for the Court's reading. It is submitted that the agency's reading and that of the Court of Appeals is wrong. Furthermore, Petitioner had no reason to make such a misstatement. In 1956, no rule or policy prevented sale of a broadcast station at any time regardless of the length of time held. After 1962, a license must be held for three years. Not so, however, in 1956. The Respondent retroactively applied the "three-year rule" adopted in 1962 to events which had occurred in 1956. This, Petitioner contends, is an improper exercise of administrative power. And even under the 1962 instituted rule, stations may be sold at any time for health or financial reasons. In other words, Petitioner did not need to lie or to misrepresent even assuming *arguendo* that he had an intent to traffick. He did not do so.

Finally, both the Respondent and the Court of Appeals below rely upon misstatements of record evidence. In reversing the initial decision of the Hearing Examiner, Respondent distorted the record testimony and these distortions were in turn picked up by the Court of Appeals below. First the Court of Appeals decision stated that Petitioner moved to Livingston, Tennessee, while stations WHBT and WDEH were for sale and in 1956 started

WLIV in Livingston.[20] Neither the Commission nor the Court of Appeals is able to substantiate this allegation by any testimony in the record. Secondly, the Court of Appeals decision stated that at the same time he moved to Livingston, Tennessee, Petitioner purchased and personally managed a 7-Up bottling plant there.[21] The fact is that Petitioner never has been the manager of his bottling plant from the time of its purchase to the present date and there is nothing in the record to the contrary. Finally, in connection with station WHBT, Respondent alleged that Petitioner's associate and long-time employee, Walter Scarbrough, testified that the station was operating smoothly, that there were no financial problems, and that Petitioner neither complained of nor gave any indication of illness during this period. Here again, the fact is that Scarbrough did not testify that the station was operating smoothly; he did not testify that there were no financial problems; and he did not testify that Petitioner gave no indication of illness. What he did say was that Petitioner did not spend as much time at WHBT during the last year and one-half he owned that station as he did earlier. As to whether that was due to Petitioner's health, Scarbrough stated he could not answer that question. (JA 846-847)

It must be noted that Petitioner's 1956 purposes given for requesting permission to assign the licenses of Stations WHBT in Harriman and WDEH in Sweetwater were before the Agency for consideration on three separate occasions that year. They were also considered by the agency before its grant of the WXXL construction permit in 1966. At no time did the Agency request supplementation or indicate inadequacy or incompleteness thereof. Petitioner's proposed ownership interest in Station WLIV was fully disclosed to the agency before the applications to assign the WHBT and WDEH licenses were filed. The

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[20] Appendix, p. 2a.

[21] Appendix, p. 2a.

listing of Petitioner in the WLIV application for permission to construct as the proposed General Manager of WLIV not only was before the Agency since 1956, but Petitioner's participation as such was fully explained to the Agency before it granted the WXXL application. McCoin's continued listing, without Petitioner's knowledge, of Petitioner as General Manager of WLIV after 1956 cannot be a part of the factual predicate necessary to support the Agency conclusion. Petitioner has not indicated at any time that his illness commenced in 1956. To the contrary, he has consistently stated that his purpose in selling WHBT and WDEH in 1956 was to withdraw at that time from the radio business in Harriman and Sweetwater, respectively. That desire was motivated by illness caused in 1955 by managerial inadequacies in the absentee-owned station in Sweetwater. In other words, Petitioner's purposes in selling WHBT and WDEH were before the Commission on three separate occasions in 1956. Not then, nor at any time since, has the Commission asked to have those purposes or reasons expanded. It found them to be acceptable as stated. It also found them acceptable in 1966 when it granted the WXXL application. And, what is more, it is finding such purposes given by proposed sellers in assignment applications acceptable now.[22] Petitioner had no intention to engage in trafficking and carried the burden of proof to establish that he did not do so.

There is something less than fair in now finding fault with Petitioner's 1956 responses to application questions

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[22] For example, the Commission on September 15, 1967, granted an application to assign the license of Station KODL, the Dallas, Oregon, wherein the reason or purpose for requesting the assignment was "assignor desires to dispose of Radio Station KODL." (See BAL-6142). On September 19, 1967, the Commission granted an application to assign the license of Station KCHE, Cherokee, Iowa, wherein the reason or purpose for requesting the assignment was "assignor desires to withdraw from the broadcasting business." (See BAL-6103).

based upon incompleteness when the Agency three separate times did not question them or ask for supplementation. Surely there is a duty reposing in this Federal agency which requires it to raise questions of response-adequacy to form questions at a time other than ten years hence in an evidentiary context wherein the applicant's memory is put to the test and his answers then called evasive, vague and incredible.

If Petitioner's investment in WXXL made by virtue of Commission grant is to be lost, if he is to be branded a trafficker, and if he is for all practical purposes to be barred from holding a broadcast franchise for the rest of his life, no part of such decision should rest to any degree upon agency neglect or vicissitudes of its judgment. If the Commission now considers that Petitioner's stated purposes in 1956 should have been expanded to state the "whys" motivating his decision to withdraw from broadcasting at that time in Harriman and Sweetwater, it should have then requested supplementation or notified Petitioner of the inadequacies of his stated purposes. What is more, the Commission granted in 1966 Petitioner's WXXL application after it was informed that Petitioner's illness was such a "why".

Forgotten, it would appear by respondent and the court below is the fact that in all of this record not one word appears to indicate that any of Petitioner's broadcast activities resulted in anything but operation in the public interest. Not a complaint is there. They neglect also to consider the attributes of intent to serve the public which would appear in Petitioner's broadcast record and which the Commission, in other cases, has held were indicative of a lack of intent to engage in trafficking. Here would fall his improvement in the facilities of WHBT and his effort to improve WDEH even after there was an assignment of license application on file.

II. The Federal Communications Commission Has Never Had a Clear Legal Standard and Has Greatly Vacillated in Its Policy Considerations of the Treatment of Trafficking Charges, and Has Never Before Found Trafficking To Exist in a Fact Pattern Wherein in Reason Only One Broadcast Facility Was Involved, Regardless of the Inter-Play of the Elements of Price, Time, and Intention.

At various times, the Federal Communications Commission has defined "trafficking" as speculation in the public domain, *Powell Crosley, Jr.*, 11 FCC 3, 3 Pike and Fischer RR 6 (1945); as a primary intention to sell broadcast properties at a profit rather than to operate them in the public interest, *WMIE-TV, Inc.*, FCC, 11 Pike and Fischer RR 1091 (1955), and *Romac Baton Rouge Corp.*, 7 FCC 2d 564, 9 Pike and Fischer RR 2d 1029 (Rev. Bd. 1967); as the acquisition of broadcast licenses for sale rather than service, *Folkways Broadcasting Co., Inc.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 375 F. 2d 298 (1967); and as the acquisition and/or operation of a broadcast station for the primary purpose of selling or otherwise disposing of it for profit rather than for the primary purpose of serving the public interest, *F. L. Crowder*, 9 FCC 2d 731, 10 Pike and Fischer 2d 981 (1967). The Federal Communications Commission objects to it upon the theory that a Government license granted in reliance upon an applicant's stated intention to operate should not, instead, be bartered away for profit to the detriment of the public interest. See *WMIE-TV, supra.*

In determining the existence or non-existence of trafficking, the Federal Communications Commission has most frequently considered as elements Time, Price and Intention. *Sunset Broadcast Corp.*, 5 FCC 2d 321, 8 Pike and Fischer RR 2d 821 (1966). It has never been able, however, to arrive at a policy which provides a predictable basis or standard to test allegations of trafficking in frequencies, and, as a result, it has vacillated from one extreme to the other in various factual contexts. (See

dissenting opinion of Commissioner Webster in *E. D. Rivers, Sr.*, ... FCC ...., 12 Pike and Fischer RR 281 (1955).) In 1952 the Commission denied an application to extend the construction permit for Station WERL, East Rainelle, West Virginia, and dismissed as moot an application to assign a permit for that station on the ground that, although only a couple of thousand dollars was involved, an extension of the permit and the assignment thereof would be tantamount to a sale of the frequency. (See dissenting opinion of Commissioner Webster in *E. D. Rivers, Sr., supra.*) Since that time the Commission has approved assignments and transfers of bare permits where the payment of many thousands of dollars has been involved. In 1954, it held that sale of a television station for a profit of $750,000 after operation thereof for less than two years and the application within a year of the sale for another television station in a community from which a high grade of service would be provided to the original city was not trafficking. *Versluis Radio and Television, Inc.*, —— FCC ——, 9 Pike and Fischer RR 1123 (1954). In 1956, it found that an unusually high profit from a station sale did not reflect adversely upon the seller, providing only one station was involved. *The Travelers Broadcasting Service Corp.*, —— FCC ——, 12 Pike and Fischer RR 689 (1956). In 1960, acquisition and disposal of nve radio stations in 14 years, with one such station having been held for less than two years, were not considered to be trafficking. *Laramie Broadcasters,* 29 FCC 1074, 20 Pike and Fischer RR 423 (1960). Also in that year, the Commission considered it to be acceptable to file an application for a broadcast station within one year after the sale of other facilities, even if the application is for the same general area wherein the applicant has sold a former broadcast interest. *Eastern States Broadcasting Corp.*, 29 FCC 730, 19 Pike and Fischer RR 1143 (1960); *Richard B. Gilbert,* 28 FCC 34, 19 Pike and Fischer RR 574 (1960).

During the 1960 and 1961 fiscal years, 380 of 782 (48%) applications seeking substantial changes in ownership related to stations held less than three years. Few, if any, of the 380 applications were designated for hearing on trafficking issues. *Edina Corp.*, 4 FCC 2d 36, 7 Pike and Fischer RR 2d 737 (Rev. Bd. 1966). In nearly 50% of such applications (stations held less than three years), the selling prices were substantially in excess over the amounts paid by the sellers or expended by them in construction of the facilities involved. *Notice of Proposed Rule Making*, Docket No. 13864, FCC 60-1466 (1966).

In 1960, Congress amended the Communications Act to preclude the Commission from approving in hearing cases dismissal of a competing application, not involving a merger, for a consideration in excess of legitimate and prudent expenditures incurred in application preparation, filing and prosecution. *Section 311 (c) of the Communications Act of 1934, as amended, 47 USC Section 311 (c).*[23] Finally, effective as of March 23, 1962, the Commission adopted what has generally become known as the "Three-Year Rule," 47 CFR Section 1.597, which provides that an applicant seeking Commission consent to a transfer or assignment of a station held for less than three years is required to make a compelling, affirmative showing of unforeseen changed circumstances or a hardship, more or less beyond his control, for a grant without hearing. See *In the Matter of Amendment of Part 1*, 32 FCC 689, 23 Pike and Fischer RR 1503 (1962).

Still, no clear-cut policy has evolved to guide Commission consideration of trafficking allegations. The rationale of decisions in this area is reconcilable only by taking refuge in varying factual patterns. As acceptable in theory as this may be, excessive reliance thereon in fact results in vacillation as much now as in 1955 when Com-

[23] As a matter of policy, the Commission now applies this standard to assignments and transfers of construction permits in general.

missioner Webster dissented in *Rivers, supra,* and thereby acknowledged that the Commission has never seemed to be able to arrive at a policy under which it could determine what constitutes trafficking in broadcast licenses. For example, in 1966 the Commission found no trafficking where an applicant's principal had owned controlling interests in twelve broadcast properties over a period of years, all of which were disposed of at substantial profits. Of the twelve stations which were sold, one was held for nine years, one for seven, one for six, and one for two. *Sunset Broadcasting Corp., supra.* Likewise, in *Romac Baton Rouge Corp., supra,* a 1967 decision, the Commission decreed the nonexistence of trafficking in a fact pattern disclosing seventeen acquisitions and sales or application participation at substantial profits over a fifteen-year period. Three of the nine stations in which a direct interest was held by the applicant and in another where the interest was held by his wife were held for less than three years. In this case, the Commission indicated that improvement of station facilities was an indication of an intent not to engage in trafficking—a factor present here but ignored by the court below.

Variances in Commission treatment of trafficking allegations is best illustrated, perhaps, by the awesome difference between its conclusions in the present case wherein reason one station is involved and its conclusions in *KIMN Broadcasting Co.,* 8 FCC 2d 440, 10 Pike and Fischer RR 2d 237 (1967). In *KIMN* a Petition to Deny the proposed transfer of control of a broadcast station pointed out that the principal stockholder of the proposed transferee had engaged since 1947 in thirty-four major transactions involving broadcast properties; that five such transactions involved sales of stations held less than three years, one of which was held for two months after acquisition and one having been held for five months after commencement of operation; that repeated inconsistent statements had been made to the Commission regarding such acquisitions

and sales; and that the alleged trafficker's net worth because of his dealing in broadcast franchises had risen from $325,307 in 1945 to some $16,867,000 in 1962. Percentage of profit gained from a single station sale was as high as 2,000%. Nonetheless, the Commission granted without hearing the acquisition requested, and dismissed the Petition to Deny, stating that the allegations raised of trafficking and inconsistent statements in prior applications were "without merit."

It was against this background that the Commission decided the present case some two months later. It found Petitioner guilty of trafficking in a fact pattern which under any reasonable analysis of his broadcast history could involve only *one* broadcast station,[24] an agency conclusion never before made regardless of the inter-play of intention, time and price.

III. The Decision Below Adversely Affects Thousands of Radio and Television Broadcasters and Threatens the Future Growth and Stability of the Broadcasting Industry.

Trafficking necessarily is essentially composed of two ingredients—an intent to engage therein conceived at some point before disposal of the broadcast facility and consummation of that intention by disposal. One without the other is not sufficient, and of the two, intent is the key. It must be established by credible evidence and cannot be inferred simply because of the sale, else every broadcaster who has disposed of a broadcast facility is inferentially guilty of trafficking. Yet, this may be the result of the decision in the present case. Following the decision in the present case, the Federal Communications Commission has made a poignant revival of the trafficking issue and has alleged trafficking to exist where it has never existed before.

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[24] WDEH, the Sweetwater station Petitioner owned for two years.

The Court of Appeals decision in the present case was decided on June 20, 1968. On June 25, 1968, the Federal Communications Commission, in a virtual eleventh hour move, reversed its position[25] on alleged trafficking conducted by one of the principals of Station KAPP (TV), Yakima, Washington. The charge was made by KIMA-TV[26] against group broadcaster Morgan Murphy whose Apple Valley Broadcasting Company holds the KAPP construction permit and who would own 30% of and exercise negative control over a merged group seeking the construction permit. The Commission refused[27] to include the trafficking issue when it set the competing applications for hearing in 1966; its Review Board approved[28] the merger last year, and the Commission refused KIMA-TV's request to review that decision.[29] KIMA-TV then appealed[30] to the United States Court of Appeals for the District of Columbia, alleging, among other things, that

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[25] *Cascade Broadcasting Company, Inc.* v. *Federal Communications Commission.* See *"Motion for Remand"* filed by the FCC on June 25, 1968, in Case No. 21,766 in the United States Court of Appeals for the District of Columbia.

[26] *"Petition to Deny"* Apple Valley application filed on behalf of Cascade Broadcasting Company, Inc., November 29, 1965, Case No. 21,766 in the United States Court of Appeals for the District of Columbia.

[27] *Memorandum Opinion and Order* of the Federal Communications Commission, released October 18, 1966, Case No. 21,766 in the United States Court of Appeals for the District of Columbia.

[28] *Memorandum Opinion and Order* by Review Board, released September 7, 1967, in Case No. 21,766 in the United States Court of Appeals for the District of Columbia.

[29] *Order* of the Federal Communications Commission, released February 21, 1968, Case No. 21,766 in the United States Court of Appeals for the District of Coulmbia.

[30] *Brief on Appeal from Memorandum Opinion and Order of the Federal Communications Commission*, filed by Cascade Broadcasting Company, Inc., in Case No. 21,766 in the United States Court of Appeals for the District of Columbia.

the Commission failed to specify a trafficking issue against Apple Valley.

The Commission, in a brief[31] filed with the Court of Appeals, was already on record defending its reasons for declining a trafficking issue. Then, eight days later and two days before an oral argument in court, the Commission requested that the case be returned so that it "may order a hearing on the allegation that Morgan Murphy, a principal in Apple Valley Broadcasting Company, has trafficked in broadcast licenses."[32] The request was made, the Commission said, because of recent appellate decisions which have a "bearing on the trafficking questions"[33] and which were rendered "after the adoption of the order in the present case."[34] The central appellate court decision referred to by the Commission as the basis for its motion for remand was the present case.

That the Circuit Court of Appeals' decision in the present case prompted the Commission's demand request for remand in the Yakima case is absolutely clear. The Commission was vigorously defending its position before the Circuit Court of Appeals on June 17. The decision below was delivered on June 20. The Commission asked for remand on June 25, citing Petitioner's case.

But what had it said in its June 17 brief[35] about Mr. Murphy?

The Commission noted that between 1924 and 1961, Mr. Murphy owned seven AM radio stations, two FM stations, and three television stations, holding each station in excess

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[31] *Brief for Appellee* filed by Federal Communications Commission on June 17, 1968, in Case No. 21,766 in the United States Court of Appeals for the District of Columbia.

[32] *Motion for Remand*, Note 20, *supra*, p. 1.

[33] Id., p. 1.

[34] Id., p. 2.

[35] *Brief for Appellee*, Note 26, *supra*.

of six years (except for one, that was held for two years), and did not sell his first station until 1958. Five of these stations were held for over 22 years. The Commission noted that Mr. Murphy had "pioneered" in setting up local radio stations, and that with the advent of television in the 1950's, he turned his attention to this service and between 1958 and 1961 sold his radio interests.[36] KIMA-TV alleged Mr. Murphy's actions since 1958 revealed his "real" intent—to speculate in broadcast licenses.

The Commission suggested that, "Apparently it is KIMA-TV's position that a man who has been a broadcaster for more than 30 years changed the nature of his character when he was nearly 60 years of age and thereafter became a speculator in broadcast licenses."[37] It reaffirmed its practice of reviewing an applicant's broadcast history of acquisitions and sales when a trafficking question is raised. It said it did so in this case and concluded that "the mere acquisition of broadcast properties and the subsequent disposal thereof for a profit over a long period of time, do not raise an inference of trafficking."[38] Now the Commission wants to hold a hearing on the trafficking allegations. This clearly evidences the extreme change of FCC policy towards trafficking brought about as the direct result of the decision in the present case, and the absence of a concrete legal standard for judging allegations of trafficking.

This continual vacillation by the Federal Communications Commission points out the great vagueness in its policy towards trafficking allegations and lack of an established legal standard. It leaves thousands of radio and television broadcasters without a reliable standard for guidance as to what they can and cannot do. They are forced to live with an FCC policy which leaves them with-

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[36] Id., p. 24, 25.

[37] Id., p. 24.

[38] Id., p. 27.

out any real knowledge as to when they can and cannot buy or sell a broadcast facility. Broadcasting is a big business like every other, and as such it routinely involves ownership changes.[39] All broadcasters look to make a profit and many to eventually sell their investment. This is normal business behavior. However, the decision below involves such an extreme tightening to an unknown extent of the Federal Communications Commission policy on trafficking that it will undoubtedly have serious adverse effects on the broadcasting industry. The present trafficking policy, as evidenced by the case law, has vacillated from "laissez-faire" to tightest government regulation, as exemplified by the present case and the subsequent Yakima case, and leaves all broadcasters faced with a serious dilemma. In every case in the future when a broadcaster desires to sell his facility, he will encounter allegations of trafficking regardless of how long he has held his present facility and regardless of how well he has operated his station in the public interest. It is obvious, therefore, that the past vacillation in FCC policy and the recent tightening in agency regulation will greatly discourage the entrance into broadacasting of highly qualified individuals and companies. If the avenues to buy and sell broadcasting facilities are foreclosed due to a fear of being accused and condemned as a trafficker in broadcast licenses, many potential broadcasters will be deterred from entering the field and present broadcasters will be deterred from selling their broadcast facilities. The present thousands of broadcasters in the broadcasting industry are being coerced by this vacillating standard into never being able to really know

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[39] On September 22, 1967, Chairman Hyde of the Federal Communications Commission addressed the International Radio and Television Society in New York City. During the course of his remarks, he stated that "I trust that I have not given the impression that I have overlooked the fact that broadcasting is business, small business in many, many communities, big business in the national sense."

if and when they can and cannot buy or sell broadcast licenses. The result will be stagnation in the industry. New competitors with new and progressive ideas for bettering broadcasting will be deterred from entering the industry, while present broadcasters will be afraid to buy and/or sell present facilities.

The submission to the Federal Communications Commission of an application for permission to construct or to acquire a broadcast station by assignment or transfer does not bear with it an implied promise that the applicant will maintain his ownership interest therein forever. At best, and only since adoption of the so-called "Three-Year Rule" in 1962, such a request implies a commitment to operate the station acquired for a three-year period, assuming it is profitable, and ill health or other waiver-type reasons do not interfere. Even this was not the case in 1956 when WHBT in Harriman (held for ten years) and WDEH in Sweetwater (held for two years) were sold by Petitioner. At that time, one could sell for any reason at any time. The Respondent has wrongfully applied the "Three-Year Rule" retroactively to Petitioner's sale of WDEH in Sweetwater and the court below was in error to uphold such misapplication of the Rule. Petitioner's sales, however, could be judged even by today's standards and be found not wanting.[40] Regardless, the buying and selling of broad-

[40] Petitioner sold WDEH because absentee-ownership forced him to rely upon hired managerial assistance. The station was not financially successful, creating such concern in Petitioner that his health suffered. For these underlying motives, he wished to get completely out of broadcasting in both Harriman and Sweetwater. Today, waivers of the Three-Year Rule are granted by the Commission for both financial and health reasons. See *A-C Broadcasters*, FCC 67-1084, decided September 27, 1967, wherein the Commission stated that "requests to transfer a station because it is financially unprofitable do not warrant an inference of trafficking." Of course, no question of that nature could arise with regard to the sale of WHBT. Petitioner held that interest for 10 years before he sold.

cast facilities is normal and desirable and should not be foreclosed as the decision below would dictate.

CONCLUSION

Petitioner desires this Court to review the decision below not just because he feels it is an unjust decision to him. Rather, review is desirable and, indeed, necessary because of the adverse future affects this decision may have on all radio and television broadcasters. To imply that a man is a trafficker in broadcast licenses because he desires to sell his facilities when he has held them for less than three years and therefore a hearing is desirable is one thing. But it is a far different and highly undesirable thing to imply that every man who desires to sell his broadcast facilities is a trafficker, regardless of how long or how well he has served the public. And yet the latter may well be the direct result of the decision below. Here we have a man labeled as a trafficker who held one facility for ten years and another for two years and who was advised to sell both because of ill health. That decision was in turn applied by the FCC against a man who was in radio broadcasting for over thirty years before he decided to sell his first facility—applied against a man acknowledged to be a "pioneer" in setting up local radio stations and a servant to the public interest—applied so as to allege he intended to traffick in broadcast licenses. If the trafficking policy of the FCC has become so enlarged and further obscured by the decision below so as to be applicable to such a man, then is it not applicable to every broadcaster in the industry? Carried to its logical conclusion, the decision below allows any broadcaster to allege any other broadcaster is a trafficker in broadcast licenses any time a broadcaster desires to sell his facilities, and thereby put that broadcaster into a costly administrative hearing before his application to sell can be finally acted upon by the FCC. This can occur under the decision below regardless of how long a man has operated his facility, be it three years or thirty years. This, Petitioner

argues, cannot be allowed. To have a trafficking policy so vague and so vacillating as to put every broadcaster in fear of being alleged a trafficker when he desires to sell his facility, regardless of his intent, so that he must defend himself in a costly administrative hearing is beyond the constitutional power intended to be vested in the Federal Communications Commission. To permit such a policy to exist is to discourage every present broadcaster from selling his present facility or purchasing others and to foreclose any potential new broadcaster from entering the industry. The precedent which the decision below will establish will adversely affect every broadcaster, present and potential, and the future of the broadcasting industry. The question of trafficking policy could affect the course of radio and television communications in this country for years to come. It, therefore, commends itself to a determination by this Court.

Respectfully submitted,

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APPENDIX